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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM J. CAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 14A04-0705-PC-269
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Robert L. Arthur, Judge
Cause No. 14C01-0008-CF-9

September 27, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, William J. Cain (Cain), appeals his conviction for Count I, attempted murder, a Class A felony, Ind. Code §§ 35-41-5-1, 35-42-1-1(1).

We affirm.

ISSUE

Cain raises one issue on appeal, which we restate as follows: Whether the trial court properly sentenced Cain.

FACTS AND PROCEDURAL HISTORY

On August 23, 2000, Christopher Nalker (Nalker) was acquitted of the murder of Julie Wessell, Cain's stepdaughter. After learning the verdict, Cain went to Nalker's parents' home looking for Nalker, and stated he was going to kill Nalker. Not finding Nalker in the house, Cain proceeded to get in Nalker's mother's vehicle and drive away. Nalker's parents then called the Washington Police Department and reported the recent series of events, including a description of the vehicle Cain took from their driveway.

Later that day, a Washington Police officer stopped Cain in Nalker's mother's vehicle. After pulling to the side of the road, Cain opened the driver's side door and fired numerous shots from a small caliber rifle and one shot from a shotgun in the direction of the police officers, then drove away. Cain later turned himself in to the Daviess County Sheriff's Department.

On August 24, 2000, the State filed an Information charging Cain with Count I, attempted murder, a Class A felony, I.C. §§ 35-41-5-1, 35-42-1-1(1); Count II, attempted

murder, a Class A felony, I.C. §§ 35-41-5-1, 35-42-1-1(1); Count III, attempted murder, a Class A felony, I.C. §§ 35-41-5-1, 35-42-1-1(1); and Count IV, attempted murder, a Class A felony, I.C. §§ 35-41-5-1, 35-42-1-1(1). On August 28, 2000, the State filed an additional Information adding Count V, burglary, a Class B felony, I.C. § 35-43-2-1(1)(B); Count VI, carjacking, a Class B felony, I.C. § 35-42-5-2(1); Count VII, confinement, a Class B felony, I.C. § 35-42-3-3(1); and Count VIII, unlawful possession of a firearm by a serious violent felon, a Class B felony, I.C. § 35-47-4-5(c). On August 24, 2001, Cain entered into a plea agreement. Pursuant to the plea agreement, Cain pled guilty to Count I, attempted murder, a Class A felony, I.C. §§ 35-41-5-1, 35-42-1-1(1), and the State dismissed the remaining charges. The plea agreement provided the trial court could not impose a sentence greater than thirty years executed with an additional ten years suspended for an aggregate sentence of forty years. On October 1, 2001, the trial court sentenced Cain to forty years with ten years suspended to probation.

Cain now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Cain argues the trial court abused its discretion by imposing an aggregate sentence of forty years. Specifically, Cain claims his criminal history should have been given minimal weight as an aggravating factor, and that his guilty plea and surrender should have been recognized as mitigating factors.

I. *Standard of Review*

In evaluating Cain's contentions, we must first address the change in the criminal sentencing scheme in Indiana. Our legislature responded to *Blakely v. Washington*, 542 U.S. 296 (2004), by amending our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. *Weaver v. State*, 845 N.E. 2d 1066, 1070 (Ind. Ct. App. 2006), *trans. denied*. Under the new advisory sentencing scheme, "a court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution 'regardless of the presence of aggravating circumstances or mitigating circumstances.'" *Id.* (quoting I.C. § 35-38-1-7.1(d)). Thus, while under the previous presumptive sentencing scheme, a sentence was required to be supported by *Blakely*-appropriate aggravators and mitigators, under the new advisory sentencing scheme, a trial court may impose any sentence within the proper statutory range regardless of the presence or absence of aggravators or mitigators.

Here, Cain committed the crime, pled guilty, and was sentenced prior to the legislature's enactment of the advisory sentencing scheme. Cain was also sentenced prior to *Blakely*, and now contests his sentence by means of a belated appeal. Our supreme court, in *Gutermuth v. State*, 868 N.E.2d 427, 433 (Ind. 2007), directs us to treat belated appeals as though they were filed within the time period for a timely appeal, and subject to the law that would have governed a timely appeal. Therefore, Cain's sentence should be reviewed under the pre-*Blakely* presumptive sentencing scheme.

Sentencing decisions are within the trial court's discretion, and we will reverse only for an abuse of discretion. *Moyer v. State*, 796 N.E.2d 309, 312 (Ind. Ct. App. 2003). It is within the trial court's discretion to determine whether a presumptive sentence will be enhanced due to aggravating factors. *Settles v. State*, 791 N.E.2d 812, 814 (Ind. Ct. App. 2003). When the trial court does enhance a sentence, it must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reasons why each circumstance is aggravating or mitigating; and (3) evaluate and balance the mitigating against the aggravating circumstances to determine if the mitigating offset the aggravating factors. *Id.* It is generally inappropriate for us to substitute our opinions for those of the trial court, as "reasonable minds may differ due to the subjectivity of the sentencing process." *Id.* (quoting *Buchanan v. State*, 767 N.E.2d 967, 970 (Ind. 2002)).

In the case before us, Cain pled guilty to attempted murder, a Class A felony. A Class A felony carries a presumptive sentence of thirty years, a minimum of twenty years, and a maximum of fifty years. I.C. § 35-50-2-4. Per the limitations of his plea agreement, however, Cain was sentenced to forty years with ten years suspended to probation. At the sentencing hearing, the trial court found the following aggravating circumstances: (1) Cain's criminal history, specifically his misdemeanor conviction of operating a vehicle while intoxicated; and (2) that the imposition of a reduced sentence or a suspended sentence and the imposition of probation would depreciate the seriousness of the offense. The trial court found that the offense was unlikely to recur as the only mitigating circumstance.

II. Aggravating Factors

A. *Criminal History*

Cain argues his criminal history of one misdemeanor conviction, while appropriately recognized as an aggravator, should not have been given significant weight. For support Cain relies upon three Indiana supreme court cases, which all speak to the weight insignificant prior convictions should carry. In *Cotto v. State*, 829 N.E.2d 520, 526 (Ind. 2005), our supreme court held, "alcohol-related misdemeanor convictions are only marginally significant as aggravating factors in considering a sentence for a Class A felony," and reduced the trial court's sentence to the presumptive sentence. In *Neale v. State*, 826 N.E.2d 635, 638-39 (Ind. 2004), our supreme court found that a prior misdemeanor alcohol related conviction did not justify the maximum sentence for a Class A felony. In *Ruiz v. State*, 818 N.E.2d 927, 928-29 (Ind. 2004), our supreme court found the maximum sentence imposed by the trial court was based on "unrelated and relatively insignificant prior convictions" and reduced the sentence to the presumptive. Thus, we must agree with Cain that his one alcohol related misdemeanor conviction should not carry significant aggravating weight.

B. *Reduced or Suspended Sentence*

Cain also asserts that finding the imposition of a reduced or suspended sentence would depreciate the seriousness of a crime cannot be used to enhance a sentence beyond the presumptive. We agree. In *Montgomery v. State*, 694 N.E.2d 1137, 1142 (Ind.1998), our supreme court stated, "a finding that a lesser sentence would depreciate the seriousness of the

crime has application only when considering imposition of a sentence of shorter duration than the presumptive sentence, not when enhancing a sentence." Thus, the trial court erred in considering this factor as an aggravating circumstance as it enhanced Cain's sentence ten years above the presumptive sentence.

III. *Mitigating Factors*

With respect to mitigating factors, Cain argues the trial court omitted some factors that were clearly supported by the record. Specifically, Cain asserts the trial court improperly failed to consider his guilty plea, surrender, and letters of support as mitigating factors.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 843 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. However, when a trial court fails to find a mitigator that the record clearly supports, a reasonable belief arises that the mitigator was improperly overlooked. *Cotto*, 829 N.E.2d at 525.

A. *Guilty Plea*

Cain claims his guilty plea should have been entitled to significant mitigating weight. Although this court has stated, a "defendant's guilty plea may be a significant mitigating factor as it saves court time and judicial resources," this is not to say the substantial benefit to the defendant must be at sentencing. *Antrim v. State*, 745 N.E.2d 246, 248 (Ind. Ct. App. 2001). There are situations when a defendant greatly benefits from a guilty plea, and as a result may not be so deserving of a benefit at sentencing. If, for example, the benefit is in

exchange for pleading guilty a benefit must not also necessarily be extended at sentencing. *See Sensback v. State*, 720 N.E.2d 1160, 1165 n.4 (Ind. 1999) (defendant's benefit was received when the State amended the charge from a Class A felony carrying twenty to fifty years to a Class B felony carrying six to twenty years).

Here, while Cain pled guilty to attempted murder, a Class A felony, he pled guilty in exchange for the State dismissing seven additional pending felony charges, including three other counts of attempted murder. Additionally, the State agreed to cap his sentence at forty years, with no more than thirty years executed. While the trial court undoubtedly appreciated the time Cain saved by pleading guilty, we cannot find the trial court improperly failed to consider Cain's guilty plea as a mitigating factor when assigning his sentence due to the sentencing cap and dismissal of the seven other charged felony offenses.

B. *Surrender*

Cain also argues the fact that he surrendered himself to the police is deserving of mitigating weight. However, Cain fails to cite to any case where surrendering one's self to the police has been considered a mitigating factor. More importantly however, we note that surrendering because you know the police are looking for you, as Cain was well aware due to his shooting at the police when they pulled him over, has been said to be deserving of little weight by our supreme court. *See Games v. State*, 535 N.E.2d 530, 545 (Ind. 1989). Therefore we cannot say that the trial court abused its discretion in failing to find Cain's surrender as a mitigating factor.

C. *Letters of Support*

Lastly, Cain argues letters in support of him are entitled to mitigating weight. As we find no evidence of such letters in our review of the record, we cannot find a reasonable belief that the trial court improperly overlooked this proffered mitigator. *See Cotto*, 829 N.E.2d at 525.

IV. *Balancing*

Therefore, we find Cain's guilty plea is worth little mitigating weight and the trial court did not err in failing to recognize his surrender or letters of support as mitigating factors. Additionally, we find the trial court properly recognized Cain's criminal history as an aggravating factor, but should afford it minimal weight. With respect to its finding the imposition of a reduced or suspended sentence would depreciate the seriousness of the crime, the trial court erred. However, the reasons recognized by the trial court supporting the improper aggravator still hold true: "[Cain] was stopped in a stolen car by police officers. [Cain] fired shots from multiple weapons at the officers and a civilian passenger, and the shots struck the police car while it was occupied." (Appellant's Appendix pp. 62-63). Thus, we find the aggravators outweigh the mitigators, and the trial court did not abuse its discretion by imposing an enhanced sentence.

CONCLUSION

Based on the foregoing, we find the trial court properly sentenced Cain.

Affirmed.

SHARPNACK, J., and FRIEDLANDER, J., concur.